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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-191209 DATE: August 29, 1978
**MATTER OF: Western States Construction
Company, Inc.**

DIGEST:

Bidder accepting award of contract, subject to reservation of rights to have mistake in bid claim considered may have contract price adjusted upward to reflect omitted direct materials costs and rounded off profit thereon. Fact that exact bid intended cannot be determined with certainty is not bar to correction since uncertain amounts are insignificant in view of wide spread between contract price and next low bid and relative standing of bidders would not change if correction to allow for questionable elements of bid (such as overhead) were permitted.

Pursuant to mistake in bid alleged before award, the Western States Construction Company (Western) requests an \$198,936 increase in its contract (No. F25600-77-90322, awarded by the Air Force) calling for the repair of 54 Titan II ICBM sites. The Air Force previously considered the mistake claim and denied the claim for correction.

Western originally submitted a bid of \$3,314,000, which was approximately one million dollars below the next low bid. In response to a request for verification of the bid price, Western advised the contracting officer that a mistake had been made in the calculation of materials cost in that the cost of 1080 hose assemblies had been inadvertently omitted. According to Western, the hosing costs were listed on a separate "flex hose summary sheet," and while its main spread sheets contained a notation to cross-reference to the summary sheet to obtain the total hose cost, during the final calculations of the bid the notation was overlooked and the hosing costs were omitted from the final total figure for materials costs. After explaining the mistake,

Western requested that its bid be increased by \$198,936, reflecting the direct costs of the hose assemblies, plus an additional ten percent of the amount to cover profit. Western explained that its profit for the total job had been calculated as ten percent of total materials cost, but that overhead would remain unaltered by the additional materials cost so that no increase for overhead was necessary.

The Air Force, pursuant to Armed Services Procurement Regulation (ASPR) 2-406.3(a)(2) (1976 ed.), determined that "clear and convincing evidence had been presented as to the existence of a mistake but not as to the intended bid" and that the bidder therefore would be permitted to withdraw but not modify its bid. The Air Force conceded that Western had omitted the \$198,936 cost of the hose assemblies, but denied correction because it found that the intended bid was uncertain because the overall ten percent total profit figure had been rounded off on Western's work sheets and because it did not believe that Western had satisfactorily demonstrated that the overhead figures would not have been different if the hose costs had been factored in.

Western declined to withdraw its bid and accepted award at the bid price while reserving its right to appeal the adverse decision of the Air Force. In requesting relief from this Office, Western originally asked for an upward adjustment of the bid price in the amount of \$198,936 to reflect only the direct costs of the omitted hose assemblies, but subsequently has taken the position that it is also entitled to the profit on that amount as initially requested of the Air Force.

The general rule is that bid correction may be allowed when a bidder demonstrates, by clear and convincing evidence, that a mistake was made, the nature of the mistake, and the bid price actually intended, provided the bid both as corrected and uncorrected would be low. Ace-Federal Reporters, Inc., 54 Comp. Gen. 340 (1974), 74-2 CPD 239; 51 Comp. Gen. 503 (1972); ASPR 2-406.3(a)(2). A bidder requesting correction is required to clearly and convincingly establish the actual bid intended because it would obviously be unfair to other bidders and detrimental

to the integrity of the competitive bidding system to allow the bidder, after bid opening, to first determine what bid price it should have submitted. See Columbus Building and Supply Co., B-188477, August 2, 1977, 77-2 CPD 70; J.W. Creech, Inc., B-191177, March 8, 1978, 78-1 CPD 186.

However, a bidder is not always required to clearly and convincingly establish exactly what each element of his bid would have been had the alleged mistake not been made, since correction may be allowed even though there is a narrow range of uncertainty regarding some aspect of the bid actually intended. See Fortec Constructors, B-189949, November 15, 1977, 77-2 CPD 372 and cases cited therein. The uncertainty may arise because the bidder "rounded off" his work sheet figures in entering a bid price, see George C. Martin, Inc., B-187638, January 19, 1977, 77-1 CPD 39, or because the bidder does not or cannot establish what a particular bid element, such as mark-up, would have been. See Fortec Constructors, supra.

In Fortec, we allowed correction, despite an agency determination to the contrary, even though the bidder chose not to seek correction on the basis of all factors used in its original bid price computation. In allowing correction in such a case, we are mindful of the danger that the low bidder, upon discovering an error after opening, will request correction only on the basis of those cost factors that will permit the bidder to remain low. Accordingly, a bidder may be permitted to correct a bid so as to reflect only the omission of direct costs, without a corresponding increase for profit and overhead, only where correction is requested in that form and where it is clear that the value of the correction with or without the omitted costs would not alter the relative standing of the bidders. 49 Comp. Gen. 480 (1970); B-177955, March 22, 1973; B-149798, September 7, 1962.

That test is clearly met here. The Air Force's own analysis of Western's overhead computation indicates that the inclusion of the omitted materials

cost could have increased the amount Western allowed in its original bid for overhead by "as much as \$20,000," and the Air Force recognizes that the maximum value of the omission, with an addition for overhead and profit, would be approximately \$238,830. Thus, whatever uncertainty exists with respect to profit and overhead must be regarded as relatively inconsequential in view of the \$1 million separating Western's bid and the next low bid.

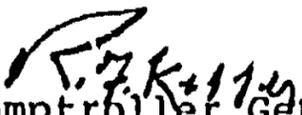
The record in this case contains a statement from the Office of the Staff Judge Advocate, Headquarters, Air Force Logistics Command, that correction is inappropriate because there has been a "change in approach by Western" in that Western is attempting to "negotiate" for whatever it can get. According to the statement, allowing correction here "would be recognizing that: a bidder can request correction, be denied, change approach, request correction again, and be permitted to correct."

The record furnished us by the Air Force indicates that Western first notified the Air Force by telegram dated September 16, 1977, that it had found an error in its bid of \$198,936, that this was the cost of material only, and that a "revised bid price" was desired. A subsequent letter from Western, also dated September 16, recited that it had accidentally omitted the amount of \$198,936 for hose assemblies and requested "an adjustment to our bid price." A few days later, on September 20, Western sent another letter, again specifying that it made an error by omitting from its bid price the cost of the hoses, explaining that the omission had no impact on its overhead computation, and requesting a price modification of \$198,936, plus 10 percent for "markup (profit)" which would be "consistent" with that included in our bid price." Shortly thereafter, the Air Force notified Western that correction would not be allowed.

It seems clear that Western's request for correction as presented to and denied by the Air Force included a request for profit as well as materials cost and therefore did not represent any change in

position by Western. It is true that Western's initial submission to this Office requested correction only in the amount of \$198,936; in subsequent correspondence, however, Western reiterated its claim of entitlement to a profit on the omitted materials amount. In any event, despite Western's apparent willingness at one point to accept correction to reflect only the direct materials cost, for the reasons indicated above we believe the Air Force's original decision denying correction was legally erroneous and that correction essentially as requested by Western should have been allowed.

We note that the work sheets indicate that on its base bid of \$3,014,012, Western added an amount for profit of \$300,000, which is the apparent rounding off of \$301,401.20. Thus, it is likely that with the addition of \$198,936 to the base bid ($\$3,014,012 + \$198,936 = \$3,212,948$), the 10 percent profit figure of \$321,295 would also have been rounded off to a lower figure. See Active Fire Sprinkler Corporation, 57 Comp. Gen. 438 (1978), 78-1 CPD 328. Accordingly, Western's contract price should be adjusted upward to reflect the omitted cost of the hose assemblies as well as a rounded off profit thereon.


Deputy Comptroller General
of the United States